Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

ESTATE OF JOSEPH SCOTT GLADDEN BY THROUGH ITS PERSONAL REPRESENTATIVE SHARRON GLADDEN; SHARRON GLADDEN, INDIVIDUALLY; SHELLY WALLING; AMANDA DIANE WALLING, FORMERLY GLADDEN, A MINOR; DEVIN RYAN GLADDEN, A MINOR, BY AND THROUGH THEIR GUARDIAN,
Petitioners,

versus

UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF PRISONS; JOHN DOES 1-10,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED

Petitioners, Estate of Joseph Scott Gladden, by and through its Personal Representative, Sharron Gladden, Sharron Gladden, Individually; Shelly Walling, Amanda Diane Walling, formerly Gladden, a minor; Devin Ryan Gladden, a minor, by and through their guardian, filed a notice of claim pursuant to the provisions of the Federal Tort Claims Act and in the notice set forth a claim for damages in excess of $100,000.00.

The lower Court held that the failure to specify an exact sum was ineffective to confer appellate jurisdiction on the District Court. The question presented here is:

Whether Appellants' claim for damages in excess of $100,000.00 in the notice is sufficient to meet the statutory requirement definition of a sum certain, pursuant to the provisions of 28 U.S.C. § 27(b).

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PETITION FOR WRIT OF CERTIORARI

Estate of Joseph Scott Gladden, by and through its Personal Representative, Sharron Gladden, Sharron Gladden, Individually; Shelly Walling, Amanda Diane Walling, formerly Gladden, a minor; Devin Ryan Gladden, a minor, by and through their guardian ("Gladden") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 6, 2001, in order to resolve the conflict between the Tenth and the Fifth and Seventh Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this Petition is unpublished by order of the Tenth Circuit. It is reprinted in Appendix A hereto ("App. A"), at page A-1. Gladden did not file a petition for rehearing or apply for a rehearing en banc.

JURISDICTION

The Estate of Joseph Scott Gladden, by and through its Personal Representative, Sharron Gladden, Sharron Gladden, individually, Amanda Diane Walling, formerly Gladden, a minor, and Devin Ryan Gladden, a minor, by and through their legal Guardian, Shelly Walling, brought a civil action against the United States of America, the United States Department of Justice, the Federal Bureau of Prisons and John Does 1 through 10 in the District Court for the Western District of Oklahoma on February 7, 2000. The Complaint

charged violations of the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, Negligent Supervision , Intentional Infliction of Emotional Distress, Civil Conspiracy, a violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, Breach of Contract and Breach of Implied Contract.

The District Court granted the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction on September 26, 2000, against all named defendants because of language contained in the Plaintiffs' Administrative Claim. Plaintiffs' filed their Notice of Appeal with the District Court on October 24, 2000. The jurisdiction of this Court rests upon 28 U.S.C. §§ 1331, 1343, 1346(a) and (b), and 1367, and the appeal is from a final judgment that disposes of all remaining claims of the parties.

STATUTES INVOLVED IN THIS CASE

Title 28 U.S.C. §2675(b) provides:

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

STATEMENT OF THE CASE

Joseph Scott Gladden was a guard at the Federal prison in El Reno, Oklahoma, that is operated by the United States Bureau of Prisons. He had received positive reviews for his job. Sometime in August 1991, he had an accident on the prison grounds when he was assaulted by an inmate. Sometime in December of 1994 or January of 1995, Joseph Gladden began having medical problems and sought medical services. He continued to be dependent on physicians and the medication they provided throughout the duration of his life. In March 1995, Joseph Gladden was once again assaulted by an inmate.

On the night of October 20, 1995 (date of the Million Man March), there was a riot at the prison. Mr. Gladden suffered facial and bodily injuries that required hospitalization. In addition, Mr. Gladden was prescribed additional medication. Following the riot, Mr. Gladden received a letter of commendation for his efforts from Mr. Thompson, the prison warden. Subsequently, however, Mr. Gladden was made to feel as if he had been at fault in the riot. He became depressed and his physicians prescribed anti-depressants. Upon information and belief, two of the prescribed anti-depressants should not have been taken together. Mr. Gladden was under the care of prison doctors and others.

During the year 1995, Mr. Gladden periodically exhibited behavior that indicated that he was under a lot of stress, that he needed additional medication to control his pain, and that he needed time off to recover. During this period of time, Mr. Gladden began to suffer from personality and mood swings, in part because of the medications he was taking. Increasingly, he began to feel isolated and deserted. Mr. Gladden also feared that his life was in danger.

Mr. Gladden periodically requested time off from work because of the increasingly stressful working environment. His requests were denied.

Finally, on December 18, 1995, after a numerous requests, Joseph Gladden received a change of duty station and was confined to his home until the date of his death on February 6, 1996. Mr. Gladden continued taking his prescribed medications because of physical pain and environmental stressors. He subsequently took his own life in a Russian-Roulette-like manner on February 6. 1996.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Opinion Directly Conflicts With the Fifth and Seventh Circuits' Ruling in *Bradley* and Is Contrary to the Liberal Policies Embodied In The Legislative History of the Act.

The decision below is in direct conflict with the Fifth Circuit's decision in *Martinez v. United States*, 728 F.2d 694 and with the Seventh's Circuit's decision in *Erxleben v. United States*, 668 F.2d 268 (7th Cir. 1981), regarding the construction of Statute 28 U.S.C. § 2675. In addition to that, the District Courts have ruled both ways on the issue.

SUMMARY OF ARGUMENT

This appeal involves the judicial statutory construction of a federal statute and its application to individual cases arising under that statute.

The Appellants' three Federal Tort Claims Act claims must be reinstated because Appellants' have substantially and

reasonably complied with the statutory requirements in filing their administrative claim. Appellants' presentation of their administrative claim "in excess of $100,000" was reasonable compliance with the sum certain requirement for filing an action against the United States under the Federal Tort Claims Act. "A claim 'in excess of $100,000.00' is sufficient and in reasonable compliance with 28 C.F.R. §14.2. *Martinez v. United States*, 728 F.2d 694, 697 (5th Cir. 1984) (accord *Erxleben v. United States*, 668 F.2d 268 (7th Cir. 1981) (limited abrogation on other grounds)).

The decision of the district court must be reversed as the decision was not sustained by sufficient evidence, is contrary to law, and is plain error under the facts of this case.

ARGUMENT

THE APPELLANTS' THREE FEDERAL TORT CLAIM ACT CLAIMS MUST BE REINSTATED BECAUSE APPELLANTS' REASONABLY COMPLIED WITH THE STATUTORY REQUIREMENTS IN FILING THEIR ADMINISTRATIVE CLAIM.

Standard of Review

The proper interpretation of a federal statute presents "questions of law [which] are subject to *de novo* review." *United States v. Johnson*, 973 F.2d 857, 859 (10th Cir. 1994).

Issue Raised And Ruled Upon Below

The issue of statutory construction presented was raised by Appellants' in their response in opposition to Defendant United States' Motion to Dismiss, which the

district court granted.

The "Sum Certain" Requirement

The Federal Tort Claim Act, 28 U.S.C. § 2671 *et seq.*, is a congressional waiver of sovereign immunity. *United States v. Kubrick*, 444 U.S. 111 (1979). Section 2675(a) mandates that, as a prerequisite to filing a suit against the United States under the Act, a claimant must present notice of his claim to the appropriate federal agency.[1]

The Federal Tort Claim Act represents a waiver of the United States' sovereign immunity and must, therefore, be strictly construed. *Pipkin v. U.S. Postal Service*, 951 F.2d 272, 275 (10th Cir. 1991). Proper presentation of the administrative claim is a jurisdictional prerequisite to suit, one which the courts have no authority to waive. *Hart v. Dep't of Labor*, 116 F.3d 1338, 1339 (10th Cir. 1997).

Federal jurisdiction to entertain actions for damages against the United States is prescribed by 28 U.S.C. § 2675(a), which requires claimants to present their case to the appropriate federal agency before suing the United States by filing "(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." *Id.* As stated in *Reilly v. U.S.*, 863 F.2d 149 (1st Cir. 1988), the Court of Appeals for the First Circuit stated "[t]he goal of the administrative claim requirement is to let the government know what it is up against: mandating that a claimant propound a definite monetary demand ensures that the government will at all

[1]28 U.S.C. § 2675(a) provides in part: An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee by the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate federal agency ...

relevant times be aware of its maximum possible exposure to liability and will be in a position to make intelligent settlement decisions. *Reilly*, 863 F.2d at 173 (citing *S.Rep.* No. 1372, 89th Cong., 2nd Sess 2, reprinted in 1966 *U.S.Code Cong. & Admn.News* 2515-2516), see also, *Martinez v. United States*, 780 F,2d 525, 530 (5th Cir. 1986), *Robinson v. United States*, 746 F.Supp. 1059 (D.Kan. 1990).

The purpose for requiring a "sum certain" with respect to an administrative claim filed against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2675(b) and 28 C.F.R. § 14.2(a), is to promote government efficiency. The filing of a "sum certain" facilitates the administrative disposition of a claim.

The legislative history underlying the statutory claim requirement of section 2675 demonstrates that although the procedure is intended to promote government efficiency,[2] it should provide for "more fair and equitable treatment of private individuals and claimants when they deal with the Government..." *S.Rep.* No.1327, 89th Cong., 2dAd.News 2515-16. The statute is "intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits." *Koziol v. United States*, 507 F.Supp. 87, 91 (N.D. Ill. 1981).

The government's reading of the "sum certain" requirement into section 2675(a) is predicated on the federal regulation implementing that statutory procedure. 28 C.F.R. § 14.2(a) provides in pertinent part:

---

[2] The process is "intended to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." *S.Rep.* No.1327, 89th Cong., 2dAd.News 2515-16.

> [A] claim shall be deemed to have been presented when a federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury or death alleged to have occurred by reason of the incident. *Id.*

The purposes for requiring a "sum certain" are defeated when there is a total failure to place a value on the claim. In this case, though, the appellants did state a specific dollar amount, "$100,000.00." This dispute arose because the appellants also included the words "in excess of" before their dollar figure.

> Section 2675(b) provides in pertinent part: Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

Considering the limited exceptions contained in section 2675(b), the agency could have reasonably limited the "sum certain" of appellants' claim to $100,000.00.

This case is factually similar to *Fallon v. United States*, 405 F.Supp. 1320 (D.Mont. 1976). In that case, claimant, using a Standard Form 95, filed a personal injury claim valued at "approximately $15,000.00." The District Court treated that as a valid claim and denied the

government's motion to dismiss the later civil suit. The court reasoned that, "[w]here a claim is filed with a federal agency contains definite figured rendered uncertain by the use of qualifying words, there seems to be no valid reason why the agencies and courts cannot treat the additional words as surplusage, leaving the certain amounts stated as the claim." *Fallon*, 405 F.Supp. at 1322.

In *Erxleben v. United States*, 668 F.2d 268, 272 (7th Cir. 1981) (limited abrogation on other grounds),the Court of Appeals for the Seventh Circuit agreed with *Fallon* and added that *Fallon's* "interpretation is responsive to the need for a 'sum certain.' The definite dollar amount can serve as a limitation on the amount of recovery, and it can guide the agency in its disposition of the claim." *Erxleben*, 668 F.2d at 272.

In *Erxleben*, the Court of Appeals for the Seventh Circuit stated that the appellant had executed and timely filed a Standard Form 95 containing specific dollar amounts corresponding to the three "amount of claim" subheadings on the form.

> The government could have acted on those figures. ... it is not within the government's discretion to reject claims which meet the minimal requirements of the statute. The appellant's claim stated a 'sum certain' as required by section 2675(a). The district court erred in granting the government's motion to dismiss on the ground that no valid claim had been filed. *Id.* at 273.

A similar result was reached in *Industrial Indemnity Company v. United States*, 504 F.Supp. 394 (E.D.Cal. 1980). The claimant in that case qualified his $560.00 personal injury claim with an asterisk referring to a notation that

stated, "Substantiation will be supplied upon request. Compensation benefits are continuing and will continue for an indefinite period." *Industrial Indemnity Company*, 504 F.Supp. at 396.

The court found that the administrative claim was valid, stating, "The plaintiff did in fact specify a sum certain in the claim, and the insertion of additional language by reason of the use of the asterisk will be treated as mere surplusage. *Id.* at 397. In its explanation, the court focused on the purposes of the administrative requirement. It found that the agency was not prevented from acting on the claim, and because the claimant signed the form, he bound himself to accept $560.00 in full satisfaction of the government. *Id.*

The very reason the issue before this Court is in dispute is because confusion exists as to the surplus language of an administrative claim stating damages "in excess of" a sum certain. The excess language puts the claim in conflict with the black letter provisions of section 2675(b), "[a]ction under this section shall not be instituted for any sum in excess of the amount of claim presented to the federal agency...." 28 U.S.C. §2675(b).

Courts have interpreted section 2675(b) in various ways. In *Caidin v. United States*, 564 F.2d 284, 287 (9th Cir. 1977), the Court of Appeals for the Ninth Circuit interpreted section 2675(b) to mean that the entire administrative claim must fail and be treated as if no administrative claim had ever been filed, despite legislative history to the contrary. This Court agreed with the *Caidin* decision in *Bradley v. United States*, 951 F.2d 268 (10th Cir. 1991).

In *Bradley*, this Court held that the timely filing of a claim in excess of $100,000.00 was insufficient to satisfy the FTCA requirement that there be a sum certain damages claim. *Bradley*, 951 F.2d at 271. However, Appellants

respectfully request that this Honorable Court revisit *Bradley* in light of the fact that there is a split of authority among the both district courts and Courts of Appeals, as outlined, herein.

Additionally, it is important to factually distinguish *Bradley* from the facts of the present case. In *Bradley*, the Court's primary review was based on the timely filing of the claims at issue. In the instant case, the administrative claims were timely filed. Nevertheless, the *Bradley* Court also considered whether Plaintiff's damage valuation "in excess of $100,000.00" was sufficient to state a sum certain. Even so, it appears from the opinion that the Appellant in Bradley failed to raise the split in authority, the legislative history of the statue at issue, or request the Court review the case on from a statutory construction standpoint. Although the *Bradley* Court mentioned the importance of congressional intent in statutory construction, the opinion did not cite any legislative history, it did not define the parameters of "sum certain" as used in other jurisdictions, nor did the Appellant request the Court consider merely deleting the surplus language, in compliance with the legislative history of the statute, as in other jurisdictions.

However, the *Bradley* Court did note that other Courts of Appeal had held that a claim "in excess of $100,000.00" was sufficient and in reasonable compliance with 28 C.F.R. §14.2. *Bradley*, 951 F.2d at 271 (citing *Martinez v. United States*, 728 F.2d 694, 697 (5th Cir. 1984)). In the instant case, the district court relied upon *Bradley v. United States*, 951 F.2d 268 (10th Cir. 1991), in dismissing the case, but failed to recognize the disagreement of authority presented by *Martinez* and mentioned in *Bradley*.

Other court interpretations of the "sum certain" requirement, including those in *Erxleben v. United States*, 668 F.2d 268 (7th Cir. 1981) and *Martinez*, *supra*, have

simply disregarded the surplus language, and have followed the strict construction of the statute as long as the claimant stated some monetary value, as in the present case. These courts have followed a true statutory construction of the relevant statutory provisions, as well as the legislative history of the statutes.

Simply put, section 2675(b) vitiates the need for excess language in a claim. It plainly states that no amount in excess of the amount presented is to be considered by an agency, unless an exceptional circumstances arise, as outlined by the statute. Applied to the case at bar, strict rules of statutory construction would dictate that the agency and district court should have considered the appellants' properly presented claim for damages in the amount of $100,000.00 and should have disregarded the excess language according to the statutory provisions.

Application of the reasoning in *Erxleben*, *Martinez* and the similar line of cases would resolve the confusing, conflicting judicial interpretations of the statutes at issue in the instant case. The legislative history of the FTCA, particularly that of section 2675, clearly shows that true a strict statutory construction analysis does not agree with the "sum certain" interpretation reached in *Caidin* and cited in *Bradley*. Thus, Appellants request this Honorable Court revisit *Bradley* given the legislative history and authority provided herein.

Because the appellants did in fact exhaust their administrative remedies in substantial compliance under the Federal Tort Claims Act, and did in fact, comply with the statutory guidelines for stating a "sum certain," the district court erred in relying on *Bradley* and in dismissing Appellants' Complaint.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 00-6361

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ESTATE OF JOSEPH SCOTT GLADDEN, by and through its Personal Representative, Sharron Gladden; SHARRON GLADDEN, Individually; SHELLY WALLING; AMANDA DIANE WALLING, formerly Gladden, a minor; DEVIN RYAN GLADDEN, a minor, by and through their guardian,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF PRISONS; JOHN DOES 1-10,
Defendants-Appellees.

September 6, 2001, Filed

NOTICE:
RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
(W.D. Okla.). (D.C. No. 00-CV-287-W).

DISPOSITION:
AFFIRMED.

COUNSEL:
For ESTATE OF JOSEPH SCOTT GLADDEN, Plaintiff - Appellant: W. Dan Nelson, Edmond, OK. Cherie M. Chappell, Edmond, OK.

For SHARRON GLADDEN, SHELLY WALLING, AMANDA DIANE WALLING, DEVIN RYAN GLADDEN, Plaintiffs - Appellants: W. Dan Nelson, Edmond, OK.

For UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, Defendants - Appellees: Eleanor Darden Thompson, Asst. U.S. Attorney, Office of the United States Attorney, Oklahoma City, OK

JUDGES:
Before TACHA, Chief Judge, BALDOCK, Circuit Judge, and BRORBY, Senior Circuit Judge.

OPINIONBY:
Bobby R. Baldock

OPINION:

ORDER AND JUDGMENT *

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In this action, plaintiffs seek compensation under the Federal Tort Claims Act (FTCA), *28 U.S.C. § 1346*(b), § 2401(b), § § 2671-80, from the United States for Joseph Scott Gladden's death, which occurred while he was employed by the Federal Bureau of Prisons. Plaintiffs contend that Mr. Gladden took his own life as a result of improper training, supervision, and accommodation to his medical concerns. The district court concluded that it was without subject matter jurisdiction to hear plaintiffs' claims, because they had failed to file an administrative tort claim

which fully complied with the FTCA. Accordingly, the court granted the United States' motion to dismiss.[1]

We review de novo the dismissal of an FTCA complaint for lack of jurisdiction. *See Cizek v. United States, 953 F.2d 1232, 1233 (10th Cir. 1992).* The sole issue on appeal is whether plaintiffs' claim, which stated their damages as "in excess of $ 100,000," Aplt. App. at 12, satisfied the notice requirements of the FTCA. Plaintiffs recognize, as they must, that this precise issue was addressed and resolved by this court in *Bradley v. United States ex rel. Veterans Admin., 951 F.2d 268, 271 (10th Cir. 1991).* In *Bradley*, we explained that "the FTCA constitutes a waiver of the government's sovereign immunity, [so that] the notice requirements established by the FTCA must be strictly construed. The requirements are jurisdictional and cannot be waived." *Id. at 270* (citation omitted).

The jurisdictional statute, *28 U.S.C. § 2675*(a), "requires that claims for damages against the government be presented to the appropriate federal agency by filing '(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim.'" *Id.* (quoting *Warren v. U.S. Dep't of Interior Bureau of Land Mgmt., 724 F.2d 776, 780 (9th Cir. 1984)).* "Failure to comply with the sum certain requirement results in the case being treated 'as if no administrative claim had ever been filed.'" *951 F.2d at 271* (quoting *Caidin v. United States, 564 F.2d 284, 287 (9th Cir. 1977)).*

A valuation without a ceiling does not "afford[] the agency sufficient information to determine whether Plaintiff's claim [is] realistic or settleable." *Id.* Accordingly, this court "declines to hold that Plaintiff's valuation of his claim as 'in excess of $ 100,000.00' [is] sufficient to satisfy the sum certain requirement." *Id.; see also Kendall v. Watkins, 998 F.2d 848, 852 (10th Cir. 1993)* (applying *Bradley* and holding that letters requesting "reinstatement, back pay, front

pay, damages for alleged blacklisting, and disciplinary action against certain federal employees," did not request a sum certain, and thus did not present an adequate claim).

Plaintiffs in the instant case urge us to revisit the issue and depart from the *Bradley* holding. We are unwilling and unable to do so. The disposition of *Bradley* binds this panel in the instant matter. Absent an intervening, contrary decision of the Supreme Court, one circuit panel cannot overrule the decision of another panel, without express authorization from the en banc court. *See, e.g., United States v. Morris, 247 F.3d 1080, 1085 (10th Cir. 2001).* Because plaintiffs did not file an administrative claim meeting the sum certain requirement, dismissal for lack of jurisdiction was appropriate. The judgment of the district court is AFFIRMED.

Entered for the Court

Bobby R. Baldock

Circuit Judge

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] Plaintiffs also alleged violations of Gladden's constitutional rights. The district court dismissed these claims, brought under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971),* as barred by the statute of limitations. Plaintiffs do not appeal this aspect of the district court's ruling.

No. CIV-00-287-W

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ESTATE OF JOSEPH SCOTT GLADDEN, et al,
Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF PRISONS; and JOHN DOES 1 THROUGH 10,
Defendants.

September 26, 2001, Filed

ORDER

This matter comes before the Court on the Motion to Dismiss fifed by defendant United States of America ("United States") pursuant to Rule 12(b)(1), F.R.Civ.P. The plaintiffs, the Estate of Joseph Scott Gladden by and through its personal representative, Sharron Gladden ("Estate"), Sharron Gladden, Individually, and Amanda Diane Walling, formerly Gladden, a minor, and Devin Ryan Gladden, a minor, by and through their guardian, Shelly Walling, have responded In opposition to the motion. The United States has flied a reply, and the plaintiffs have filed a sur-reply. Based upon the record, the Court makes its determination.

In their complaint, the plaintiffs have alleged that Joseph Scott Gladden[1] ("Gladden"), while employed as a guard at the El Reno Correctional Facility, in El Reno, Oklahoma, suffered severe facial and bodily injuries during a riot on October 20, 1995, at the prison, and that he thereafter became depressed and *was* under medical treatment.[2] The plaintiffs have further alleged that on December 18, *1995,* Gladden

received a change of duty station and was confined to his home. Gladden died on February 6, 1996,[3] and it has been determined that Gladden had been playing "Russian Roulette" on that date.

The plaintiffs have asserted six causes of action, entitled respectively: "Negligent Supervision," "Infliction of Emotional Distress," "Civil Conspiracy," "Civil Rights Violation," "Breach of Contract or Agreement," and "Breach of Implied Contract of Agreement". The plaintiffs have named as defendants, the United States, the United States Department of Justice ("DOJ"), the Federal Bureau of Prisons ("BOP") and John Does 1 through 10.

The united States has first challenged the first, second and third causes of action in the complaint which seek relief under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b),2401(b), 2671-2680. The FTCA provides the exclusive remedy for tort actions against the federal government, its agencies and employees. Under the FTCA, the United States Is the only proper defendant, Therefore, these three claims are dismissed *as* to the DOJ and the BOP.

To maintain a tort cause of action under the FTCA against the United States for damages for the negligent or wrongful act of a federal employee, the claimant must first present his or her claim in writing to the appropriate federal agency. Id. §5 2401(b), 2675. The United States has argued that the three FTCA causes of action should be dismissed because the plaintiffs' administrative claim failed to state a sum certain.

Title 28, section 14.2(a) of the Code of Federal Regulations provides that

> "a claim shall be deemed to have been presented when a Federal agency receives from a claimant . an executed Standard Form

> 95 or other written notification of an accident, accompanied by a claim for money damages In a sum certain for. . . personal Injury, or death alleged to have occurred by reason of the incident,. . .

28 C.F.R. § 14.2(a); e.g., 28 U.S.C. § 2674(b). In the instant case, the Estate sought damages "In excess of the sum of $100,000.00." Such a demand is Insufficient in this circuit to satisfy the sum certain requirement. Bradley v. United States, 951 F.2d 268 (10th Cir. 1991)(valuation of claim as "in excess of $100,000.00" does not satisfy sum. certain, requirement). Because the absence of a demand for a sum certain in the administrative claim deprives this Court of jurisdiction, id. (failure to comply with sum certain requirement results in case being treated as if no administrative claim flied), the Court finds
the United States is entitled to dismissal of the first, second and third causes of action.

In the fourth cause of action, the plaintiffs have alleged that the defendants violated Gladden's rights guaranteed under the first, fourth, fifth, ninth and fourteenth amendments to the United States Constitution, To the extent, if any, monetary relief is sought for these alleged constitutional torts from Individual defendants, the plaintiffs' cause of action arises under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 380 (1971), and Is barred by the statute of limitations.[4]

To the extent the plaintiffs have sought monetary damages for these alleged constitutional torts from the United States, the DOJ and/or the BOP, the Court finds such cause of action must also fail. The United States may not be sued without its consent and that consent Is a prerequisite for, and defines, the exercise of the Court's jurisdiction. The conditional immunity from suit likewise extends to federal departments

and agencies. Id. at 410 (constitutional tort actions for money damages cannot be directly against United States or federal agency).[5]

The United States has also sought dismissal of the fifth and sixth causes of action: breach of contract and breach of implied contract. In their complaint, the plaintiffs have alleged that Gladden was a member of the labor union for BOP employees, that he was entitled to certain benefits, namely, proper supervision and medical treatment, pursuant to a collective bargaining agreement and that the defendants failed to provide such benefits.

In Identifying the defendants In their complaint, the plaintiffs have stated that the United States, the DOJ and the BOP are being sued under the FTCA and that the unknown defendants—John Does 1 through 10—are being sued for negligent supervision, civil rights violations, conspiracy to violate Gladden's employment and civil rights and for breach of contract. Even though the events giving rise to these claims occurred in 1995 and 1996, and the instant complaint was flied over seven months ago, the plaintiffs have never attempted to identify these individual defendants. The Court finds no circumstances exist which prohibit the dismissal of these unknown defendants or any of the causes of action against them.

Furthermore, to the extent, if any, these two contract causes of action are brought against the United States, the DO) and the COP, they are dismissed. The Civil Service Reform Act of 1978 ("CSRA"), codified as amended in scattered sections of 5 U.S.C., protects federal employees "by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial-by which improper action may be redressed." Bush v. Lucas, 462 U.S. 367, 385 (1983). because the instant contract claims are preempted by

the CSRA, the United States, as well as the 003 and the BOP, is entitled to dismissal of the fifth and sixth causes of action.[6]

Having determined that all defendants are entitled to dismissal of all claims fér relief asserted against them in the complaint, the Court GRANTS the United States' Motion to Dismiss flied on June 20, 2000.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED this 26th day of September, 2000.

Footnotes

[1]Gladden was the son of Sharron Gladden and the father of Amanda Diane Walling and Devin Ryan Gladden.

[2]The plaintiffs have also alleged that Gladden was assaulted by an Inmate in August 1991, and again in March 1.995, and that in December 1994 or January 1995, he began to experience medical problems and was under treatment by physicians for these problems.

[3] In their various pleadings and papers, the plaintiffs have stated at times, that Gladden died on February 6, 1996, and at other times, that he died "during the evening bf February 6, 1996, or early morning hours of February 7, 1996."

[4] The United States Supreme Court in *Bivens v.* Six Unknown Named Agents of the Federal Bureau of Narcotics, 40 § U.S. 388 (1971), recognized actions seeking relief directly under the United States Constitution against individual federal officers in cases where no statute specifically created a remedy, and this Court has assumed for purposes of resolving the instant motion that no statute creates a remedy for the particuiar constitutional claims the plaintiffs have asserted,

Because a Bivens action "is a judicially-created remedy, it does not carry Its own statute of limitations." Industrial Construction Corp., v. United States Bureau of Reclamation, 15 F3d 963, 96B (10th Cir. 1994) Such actions are "subject to the statute of limitations of the general personal injury statute in the state where the action arose," (citations omitted), In Oklahoma, personal injury actions are governed by a two-year limitations period, 12 O.S. § 95(3).

Federal law, however, controls when the Bivens cause of action accrues, and, thus, when the limitations period begins to run. E.g., 15 F.3d at 968. case law teaches that a federal cause of action accrues when the plaintiff knows or has reason, to know of the existence and cause of the injury which is the basis of . (the] action." Id. (citations omitted).

Gladden died on February 5, 1996. The cause of action accrued no later than that date, arid the two-year period provided by section 95(3) ran on February 5, 1998. The Instant complaint was not flied until February 7, 2000, and accordingly, the plaintiffs' fourth cause of action is untimely.

To circumvent this finding, the plaintiffs have relied on the "savings statute" found Fri title 12, section 100 of the Oklahoma Statutes. An identical lawsuit was flied by the plaintiffs on February 5, 1999, Case No. CIV-99-173-W, and dismissed by the Court for lack of prosecution on June 8, 1999. The plaintiffs have contended that they refiled the instant complaint pursuant to section 100. However, the Bivens cause of action In the "original" lawsuit was itself untimely. Therefore, section 100, assuming arguendo that It applies to a Bivens cause of action, does not toil any limitations period or enlarge the time for filing this claim.

[5] To the extent, if any, this cause of action for alleged constitutional violations would arise under the FTCA, but see Federal Deposit Insurance Corp. v. Meyer, $10 U.S. 471

(1994)(United States ha; not rendered Itself liable under FTCA for constitutional tort claims), the DOJ and the BOP would not be proper party defendants and the claim would again be defective as to the united States due to the plaintiffs' faiiure to demand a sum certain In the administrative claim.

[6] In their sur-reply the plaintiffs have alleged for the first time that the contract claims are governed by the Federal Service Labor-Managment Relations Act ("FSLMRA"), 5 U.S.C. § 7101 et seq., that Gladden had the right to eject his remedies under 5 U.S.C. § 7121 and that the actions taken against Gladden violated 5 U.S.C. § 2303.

The latter statute-section 2303-pertains to prohibited personnel practices In the Federal Bureau of Investigation, and thus, Is not applicable. The FSLMRA likewise provides no basis for relief since, to the extent, if any, the plaintiffs are authorized to bring a direct action against thee defendants under the FSLMRA and their contract causes of action are not preempted by CSRA, the plaintiffs have not alleged exhaustion of the grievance procedures.